

Application of: Mark A. Hochwalt, et al.

Serial No.: 10/849,721

Amendment and Response

**REMARKS**

Applicants' request for extension of time under 37 CFR 1.136(a) as well as Applicants' petition fee are enclosed herewith and filed simultaneously with this response.

Pending Claims 50, 65, 79 and 93 have been amended to more clearly define and claim Applicants' invention, and to address the issues raised by the Examiner in the Office Action dated, March 28, 2006. Applicants' claim an improved odor control product comprising a preferred zeolite, at least one preferred acid and a metal oxide. The independent claims have been amended to more clearly limit the claims to the use of 30-99% fumaric acid and aspartic acid. Pending Claims 59, 73, 87 and 102 have been amended to correspond to the newly amended independent claims. No new matter has been added by any of the amendments herein.

In the pending Office Action, the Examiner rejected the pending claims under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 4,826,497 to Marcus et al. in view of EP 0 509 409 and U.S. Patent No. 5,780,020 to Peterson and DE 19837539. The rejection is respectfully traversed in light of the amendments to the claims and the remarks, below, as well as the previous remarks and arguments made of record in the Applicants' Preliminary Amendment dated February 28, 2006, incorporated herein by reference.

As is discussed herein, the references cited by the Examiner do not, alone or in combination, teach Applicants' improved product.

The Marcus patent discloses and claims improved zeolites.

The Examiner cites the EP patent for teaching the use of an acid in an odor control product. The EP patent teaches that the acid should be no more than 10%, with 5% more preferred and 1% most preferred (see page 4, line 42) and that the acid can be eliminated entirely

from the EP product (see page 4, lines 43-44.) This is supported by the fact that the claims of the EP patent do not include the use of any acid. The Applicants' specification does not disclose any formulation utilizing less than 24% by weight acid, and the claims have been amended to recite 30-99% acid, the Applicants' preferred range. Therefore, even if it could be said that the EP patent teaches or suggests the Applicants' use of an acid, the EP patent does not disclose the use of Applicants' acid percentages.

When this argument was offered previously, the Examiner's response was that limitations could not be read into the claims. While a number of dependent claims included these limitations previously, the Applicants have amended each independent claim to include the limitation of 30-99% acid content.

The Examiner cited the Peterson patent for the teaching that antimicrobial agents, such as zinc oxide, are used in body deodorant products to reduce odor formation by controlling bacteria or fungi.

The Applicants' arguments regarding the absence of motivation to combine the references cited by the Examiner are of record. However, even if some motivation could be found to combine these references, the combination would be, as taken directly from the Examiner's descriptions of the references, an antimicrobial composition including a zeolite and less than 10% acid. This does not disclose, teach or suggest Applicants' invention as claimed.

The Examiner has repeatedly argued that the references cannot be argued separately. However, the disclosure, suggestion or teaching of the elements, as well as the invention as a whole, must be found somewhere in the references cited. To do so otherwise is to use impermissible hindsight. It is respectfully submitted that without the Applicants' disclosure as a guide, even one skilled in the art would not be able to take the elements of the references cited,

and then alter and change the elements in opposition to the teachings of the references, as is needed to support the Examiner's arguments. This is most apparent regarding the Applicants' limitation of at least about 30% acid in the composition.

Even when the range of the prior art overlaps the range of the invention, the prior art can be overcome with evidence of the criticality of the range. "The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims...In such a situation, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art ranges.: In re Woodruff, 16 USPQ.2d 1934 (Fed. Cir. 1990) cited in the MPEP at 2144.05 III. In this case, the prior art range not only does not overlap range claimed by the Applicants, as discussed previously, the prior art teaches away from Applicants' range. Further, as is supported by the affidavit filed on February 28, 2006, prior art reference using citric acid is unstable, hence the teaching to limit the quantity to no more than 10%, preferably none at all, wherein the Applicants' composition is unexpectedly stable at the higher claimed percentages.

For these reasons, as well as those of the record, it is respectfully submitted that the claims as amended are in condition for allowance.

Application of: Mark A. Hochwalt, et al.

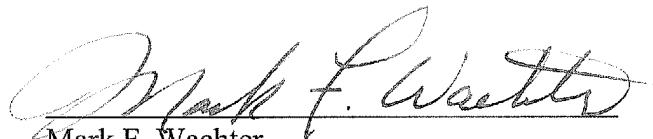
Serial No.: 10/849,721

Amendment and Response

If any issue regarding the allowability of any of the pending claims in the present application could be readily resolved, or if other action could be taken to further advance this application such as an Examiner's amendment, or if the Examiner should have any questions regarding the present amendment, it is respectfully requested that the Examiner please telephone Applicant's undersigned attorney in this regard.

Respectfully submitted,

Date: July 25, 2006



Mark F. Wachter

Reg. No. 27,243

Blackwell Sanders Peper Martin LLP

720 Olive Street, Suite 2400

St. Louis, MO 63101

314-345-6000

ATTORNEYS FOR APPLICANT